81-22

No.

Office-Supreme Court, U.S.
FILED
JUL 6 1981
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANDREW C. NEIDINGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether conflict between an oral pronouncement of sentence by the presiding judge and the written judgment should be resolved in favor of the oral pronouncement.

2. Whether the term of probation begins immediately upon the imposition of the sentence by the judge.

Andrew C. Neidinger, petitioner, respectfully moves this Court to issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit which was entered in this proceeding on March 17, 1981.

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINION BELOW

On March 17, 1981, the Court of Appeals for the Fourth Circuit issued an opinion and judgment affirming the sentence modification by the United States District Court for the District of Maryland. The opinion and judgment is reproduced at 1a. On April 2, 1981, Petitioner filed a

Petition for Rehearing. An Order denying the petition was entered on May 7, 1981. The Order is reproduced at 5a. Following the Order denying a rehearing, a corrected opinion was issued and published. A reproduction of the corrected opinion appears at 6a.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit affirming the sentence of the Maryland District Court was entered on March 17, 1981. Petitioner's Petition for Rehearing, filed April 2, 1981, was denied by an Order issued May 7, 1981. Subsequently, a corrected opinion was issued and published. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND RULE PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> No person shall . . . be twice put in jeopardy of life or limb . . .

Federal Rules of Criminal Procedure, Rule 35, 18 U.S.C.:

Correction or Reduction of Sentence

> (a) Correction of Sentence. — The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

(b) Reduction of Sentence. — The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

STATEMENT OF THE CASE

Petitioner Andrew C. Neidinger was charged by a two (2) count criminal information with violating 26 U.S.C. § 7203 (willful failure to file income tax returns) for the years 1974 and 1975, filed by the United States Attorney for the District of Maryland on March 21, 1980.

A letter dated May 6, 1980, and signed by Petitioner on May 8, 1980, outlined the plea agreement which had been reached, stating that (1) Mr. Neidinger would plead guilty to Count I of the two count criminal information, charging Petitioner with a violation of 26 U.S.C. § 7203, willful failure to file income tax returns for the years 1974 and 1975, which carries a maximum penalty of one year imprisonment and a $10,000 fine; and, (2) the United States of America would make no recommendation at the time of sentencing, but would reserve the right at sentencing to bring to the Court's attention all relevant information concerning Petitioner's background, character and conduct. The United States further agreed that at or subsequent to the time of sentencing, it would recommend that the Court dismiss Count two of the criminal information.

On May 8, 1980, Petitioner appeared before the United States District Court for the District of Maryland, the Honorable James R. Miller, Jr., presiding. Pursuant to the plea agreement, Petitioner plead guilty to the first count of the criminal information. A presentencing report was ordered and disposition was deferred until July 3, 1980.

After reviewing the presentence report, Judge Miller permitted counsel for the appellant an opportunity to speak on behalf of Andrew Neidinger and further afforded Petitioner the right of allocution. Judge Miller then sentenced Mr. Neidinger as follows:

> . . . it is the sentence of this Court, under a split sentence, that the Defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment on Count 1 of [*sic*] one year, on the condition that the Defendant be confined in a jail type institution on work release in a Montgomery County Detention Center for a period of 30 days. Execution of balance of the sentence of imprisonment is suspended. Defendant is placed on probation for a period of two years on the following terms and conditions:
>
> 1) That he pay a fine in the amount of $2,000, said fine to be payable within six months of this date.
>
> 2) That he perform eleemysonary service approved by his probation officer for a period of 100 hours.
>
> 3) That he not violate any Federal, State or local laws.
>
> 4) That he make reasonable and periodic payments on his past due tax, whatever it is ultimately assessed to be, to be approved by his probation officer. Of course, if you pay it all at once, that is fine; but I am saying if you can't the probation officer is going to be there to see that you make some type of reasonable periodic payment at least. (T. 15 7/3/80).

Upon receiving a call from Judge Miller, Petitioner and his counsel appeared in Court on July 16, 1980, for the purpose of revising the sentence. The Judge, who initiated the revision, indicated that the Montgomery County Detention Center did not have a thirty (30) day work release program, but that the Montgomery County Pre-Release Center (which is a halfway house) would accept Mr. Neidinger for a sixty (60) day work release period. (T. 2 7/16/80).

On appeal to the Fourth Circuit, Petitioner argued that the resentencing resulted in an increase in the period of mandatory confinement, that federal appellate courts have the power to review a trial judge's application of a "mechanistic" approach to sentencing, and that the Court's increase in Petitioner's sentence exceeded the Court's authority and constituted a violation of the fifth amendment constitutional guarantee against double jeopardy, since the sentence was increased after Petitioner commenced to serve his original sentence. Petitioner sought a reduction in his sentence to the original thirty day period of confinement under Rule 35 of the Federal Rules of Criminal Procedure. In rejecting Petitioner's double jeopardy argument, the Fourth Circuit Court of Appeals originally assumed that Petitioner had received and signed a copy of the written judgment in the presence of the Court, and therefore could not show any reliance on the ambiguity as to when his period of probation was to begin. (Appendix hereto, p. 3a *infra*). Petitioner filed a Petition for Rehearing indicating that he had not in fact signed a copy of the judgment or sentencing order, but had signed only the order authorizing Petitioner to report directly at his own expense to the institution designated by the Attorney General. The Court of Appeals denied the Petition for Rehearing (Appendix hereto, p. 5a *infra*).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE ORAL PRONOUNCEMENT OF SENTENCE OR THE WRITTEN JUDGMENT IS DETERMINATIVE WHEN THE TWO DIFFER.

The issue on which Petitioner seeks review is the ruling of the Fourth Circuit Court of Appeals that the written judgment, stating when the period of probation begins, takes precedence over the oral pronouncement, and the term of probation therefore did not begin immediately. (Appendix hereto, p. 8a *infra*). In ruling that the increase in the period of time Petitioner was to be placed in the work release program did not constitute a violation of the fifth amendment guarantee against double jeopardy, the Court of Appeals necessarily decided that the probationary period had not yet begun. (Appendix hereto, p. 8a *infra*). The question of when the probationary period began arose due to a discrepancy between the District Court judge's comments from the bench and his written judgment. At the July 16, 1980, hearing for resentencing, Judge Miller stated that Petitioner "should report or contact the Pre-Release Center right away; and also see his probation officer, Mr. Shaw, *since the probation starts immediately.*" (T. 8 7/16/80) (emphasis added). The Fourth Circuit, however, relied on the written judgment which stated that probation was "'to commence upon Defendant's release from confinement.'" (Appendix hereto, p. 8a *infra*). By resolving the discrepancy in favor of the written judgment, the Fourth Circuit has created a direct conflict with the other circuits.

It has generally been held that when there is a discrepancy between the pronouncement from the bench and a subsequent written judgment, it is the pronouncement rather than the judgment that is dispositive. In *Hill*

v. United States ex rel. Wampler, 298 U.S. 460 (1936), this Court held that a provision in the commitment for imprisonment which was inserted by the Clerk, but not included in the sentence orally pronounced by the judge, departed "in matter of substance from the judgment back of it," and was therefore void. *Id.* at 465. In accordance with *Hill*, the circuit courts have formulated the somewhat broader rule that "any conflict between the oral pronouncement [of sentence] and the formal judgment and commitment must be resolved in favor of the former." *Baca v. United States*, 383 F.2d 154, 157 (10th Cir. 1967).

Thus, in *United States v. Marquez*, 506 F.2d 620, 622 (2d Cir. 1974), the Second Circuit held that when there is a direct conflict between a clear and unambiguous oral pronouncement of sentence and a written judgment, the oral pronouncement must control. As in *Marquez*, the oral pronouncement of sentence in the instant case is clear as to its terms; the term of probation is to start immediately. *See also Sobel v. United States*, 407 F.2d 180, 184 (2d Cir. 1969).

The ruling by the Fourth Circuit in the instant case is also inconsistent with other decisions of the Fourth Circuit Court of Appeals. In *Rakes v. United States*, 309 F.2d 686 (4th Cir. 1962), *cert. denied*, 373 U.S. 939 (1963), the court held that the sentences to be served "are those pronounced in the defendant's presence in open court and not those set out in the written judgments of the court." *Id.* at 687. The proper remedy, therefore, was for the written judgments to be corrected to conform with the oral pronouncements. *Id.* at 688. *Accord, United States v. Morse*, 344 F.2d 27, 29 (4th Cir. 1965).

In *Patterson v. United States*, 386 F.2d 142 (5th Cir. 1967), the Fifth Circuit Court held that a commitment provision which was included in the written judgment, but not in the oral pronouncement, was void because "where

there is a discrepancy between the oral pronouncement and the written judgment and commitment, the former must control." *Id.* at 143, citing *Henley v. Heritage,* 337 F.2d 847, 848 (5th Cir. 1964).

The Sixth Circuit, in *Sasser v. United States,* 352 F.2d 796, 797 (6th Cir. 1965), while holding that the oral statements of the judge did not constitute pronouncement of a sentence, stated that when in fact the pronouncement is made, "the pronouncement of sentence represents the judgment of the court and . . . the order of judgment is merely evidence of the sentence." *Accord, Wilson v. Bell,* 137 F.2d 716, 720 (6th Cir. 1943).

Johnson v. Mabry, 602 F.2d 167 (8th Cir. 1979) involved a claim by the defendant that the original oral sentence of concurrent terms had been changed to consecutive terms in the wirtten judgment, thus violating the double jeopardy clause of the fifth amendment. While the court held that the defendant had failed to prove that the original oral sentence had indeed prescribed concurrent terms, the court stated in dictum that "the oral sentence pronounced by the sentencing judge constitutes the judgment, and anything inconsistent with the judgment which is involved in a commitment order is a nullity." *Id.* at 170. Thus, had the defendant proved that the original oral sentence was for concurrent terms, the subsequent written order of consecutive terms would have violated the fifth amendment protection against double jeopardy. *Accord, United States v. Raftis,* 427 F.2d 1145, 1146 (8th Cir. 1970).

The Ninth Circuit also has had occasion to address situations in which the oral pronouncement and written judgment differ. In both *Payne v. Madigan,* 274 F.2d 702, 704 (9th Circuit 1960), *aff'd by an equally divided court,* 366 U.S. 761 (1961), and *Spriggs v. United States,* 225 F.2d 865, 868 (9th Cir. 1955), *cert. denied* 350 U.S. 954 (1956), the Ninth Circuit held that the order of the court is the

pronouncement made by the judge in open court, rather than a subsequent docket entry or written order. *See also United States v. Munoz-Dela Rosa*, 495 F.2d 253, 256 (9th Cir. 1974). Likewise, the Tenth Circuit has consistently held that conflicts between the oral pronouncements and written orders are to be resolved in favor of the oral pronouncement. *United States v. Mason*, 440 F.2d 1293, 1299-1300 (10th Cir. 1971); *Baca v. United States, supra*, 383 F.2d at 157; *Walden v. Hudspeth*, 115 F.2d 558, 559 (10th Cir. 1941); *Watkins v. Merry*, 106 F.2d 360, 361 (10th Cir. 1939); *Western Union Telegraph Co. v. Dismang*, 106 F.2d 362, 363-64 (10th Cir. 1939).

The Circuit Court for the District of Columbia has also consistently ruled that the oral pronouncements of the court take precedence over written orders, should there be a discrepancy between the two. In *Borum v. United States*, 409 F.2d 433 (D.C. Cir. 1967), the court ruled on a question much like that in the instant case. The defendant in *Borum* was originally sentenced to concurrent terms at the oral sentencing. Prior to filing the written commitment order, the judge modified the sentence to require consecutive terms. The circuit court held that "[t]he [written] order entered June 15 was efficacious only to the extent that it was consistent with the oral pronouncement, or effectuated a modification which the judge was then empowered to make." *Id.* at 440. The court concluded that the judge was not empowered to increase the sentence since the result would be to put the defendant twice in jeopardy. *Id.* at 440. *See also, United States v. Lewis*, 626 F.2d 940, 953 (D.C. Cir. 1980); *Gilliam v. United States*. 269 F.2d 770, 772 (D.C. Cir. 1959); *Kennedy v. Reid*, 249 F.2d 492, 495 (D.C. Cir. 1957).

Thus, the circuits which have ruled on the question of which sentence controls have consistently evidenced a preference for the oral pronouncement. Yet in the instant case, while the oral sentence of the district court judge

clearly indicated that probation was to start immediately, the Fourth Circuit Court instead relied on the written judgment's direction that probation was to start upon defendant's release from confinement. The result of this ruling is to create a direct conflict not only within the Fourth Circuit, but also between the Fourth Circuit and the Second, Fifth, Sixth, Eighth, Ninth, Tenth, and D.C. Circuits. A decision by this Court to review the Fourth Circuit's decision in the case below is necessary to clarify the proper standard for a reviewing court to apply when ruling on inconsistencies between an oral pronouncement and a written order.

II.

THE DECISION BELOW IS IN CONFLICT WITH OTHER CIRCUITS AS TO WHEN THE PERIOD OF PROBATION IS TO BEGIN.

A closely related but distinct question focuses on when the period of probation is to begin. While the cases prescribing the preference of the oral over the written judgment deal for the most part with prison sentences rather than terms of probation, the logic of these cases would indicate that an oral sentence directing probation to start immediately would be favored over a subsequent written order to the contrary. The application of this general rule of preferring oral sentences is muddled by cases dealing with the more specific question of when probation is to begin.

The Second, Fifth, Sixth and Ninth Circuits have held that probation is to begin immediately upon the oral pronouncement of sentence. These rulings are consistent with the general rule favoring oral pronouncements. However, the First and Seventh Circuits have ruled that probation begins when the defendant is taken into custody. The confusion created by these rulings is twofold. First, there is the obvious conflict among the circuits as to when the period of probation is in fact to begin. Secondly,

it is unclear which of two competing doctrines should prevail when, as in the instant case, the oral pronouncement begins the term of probation immediately, but the written order provides otherwise. The general rule favoring the oral pronouncement would start the term of probation immediately. Yet adoption of a more specific rule beginning the term of probation when the defendant is taken into custody would implicitly contradict the rule favoring the oral pronouncement. The result, as in the Fourth Circuit, is intra- and inter-circuit inconsistency.

The holdings of various circuit courts illustrate the uncertainty as to when probation is to begin. The Second Circuit in *United States v. Rosenstreich*, 204 F.2d 321, 322 (2d Cir. 1973), stated simply "[a] probationary period starts when the judge imposes the sentence." Likewise, in *Sanford v. King*, 136 F.2d 106, 108 (5th Cir. 1943), the Fifth Circuit held that the probationary period begins on the date of imposition of the sentence, absent language by the judge expressing a contrary intent. The Sixth Circuit in *Gaddis v. United States*, 280 F.2d 334 (6th Cir. 1960), echoed this holding: "In the absence of express language in the pronouncement of sentence fixing the date of commencement of probation, it is deemed to commence when the judge imposes the sentence." *Id.* at 336. Though not a case dealing with probation, *Smith v. Swope*, 91 F.2d 260 (9th Cir. 1937), provides an analogous approach to the question of when a prison sentence is to begin. In *Swope* the defendant was sentenced to a prison term and a marshal was ordered to deliver the defendant for commitment. The marshal, however, failed to deliver the defendant into custody until five years later. The Ninth Circuit held that the defendant "must be deemed to be serving [the sentence] from the date he is ordered to serve it and is in the custody of the marshal under the commitment" rather than from the date of actual commitment to prison. *Id.* at 262.

In contrast to the preceeding line of cases are decisions from the First and Seventh Circuits which indicate that the sentence is to begin with custody. *Pugliese v. United States*, 353 F.2d 514, 516-517 (1st Cir. 1965), held that a defendant's sentences are "regarded as having commenced when their technical custody . . . is accepted by [the probation officer]." (citations omitted). In *United States v. Teresi*, 484 F.2d 894, 899 (7th Cir. 1973), the Seventh Circuit, relying on *Pugliese*, held that the "[d]efendant began to serve the period of probation when he reported . . . to the probation officer and the officer accepted technical custody."

The result of the dichotomy presented by these two sets of cases is that there is uncertainty and contradiction as to when the period of probation is to begin. Further, in a situation such as that in the instant case in which oral pronouncement directs probation to begin immediately, circuits holding that probation begins with custody create further conflict with circuits holding that the oral pronouncement, not a subsequent written order, constitutes the judgment of the court. A decision by this Court to grant this writ for certiorari is necessary to resolve the two-pronged dilemma presented by current rulings of the circuit courts.

CONCLUSION

For the foregoing reasons, the petitioner requests this Court to issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
For the Fourth Circuit

No. 80-5132

Andrew C. Neidinger,
Appellant

v.

United States of America,
Appellee

Appeal from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, Jr., District Judge.

Argued January 9, 1981 *Decided March 17, 1981*

Before BUTZNER, PHILLIPS, and ERVIN, Circuit Judges.

Henry L. Belsky (Steinberg, Schlachman, Potler, Belsky and Weiner, P.A.; Joseph L. Ely on brief) for Appellant; Edward M. Norton, Jr., Assistant U.S. Attorney (Russell T. Baker, Jr., U.S. Attorney on brief) for Appellee.

ERVIN, Circuit Judge:

Andrew Neidinger appeals the modified sentence imposed upon him by the district court for willful failure to

fine a federal income tax return for 1974, in violation of 26 U.S.C. § 7203. Neidinger was originally sentenced on July 3, 1980 to one year of imprisonment, on the condition that he be confined in the Montgomery County Detention Center for thirty days and placed on work release. The district court suspended execution of the remainder of the sentence and order that Neidinger be put on probation for two years, the probationary period to commence following his release from confinement. Neidinger was ordered to report to the Detention Center upon written notice from the United States Marshal, and, in the absence of such notice, he was to surrender himself to the Marshal on July 24, 1980. Subsequent to the July 3rd hearing, and before Neidinger was placed in confinement, the district court learned that the Montgomery County Detention Center would not accept Neidinger for a thirty day work release program. The court therefore requested Neidinger to appear on July 16th for sentence modification. At that time, the court suspended execution of the entire one year sentence and placed Neidinger on immediate probation for two years, requiring him as a condition of probation to reside in the Montgomery County Pre-Release Center (a halfway house) for sixty days on work release.

Neidinger argues that the modified sentence increased his original sentence after he had commenced to serve it, and that it therefore violated the Fifth Amendment guarantee against double jeopardy.

We are not persuaded by this argument. Constitutional protection against double jeopardy does not attach prior to the commencement of a sentence. *See, e.g., United States v. Bynoe,* 562 F.2d 126 (1st Cir. 1977); *Acme Poultry Corp. v. United States,* 146 F.2d 738 (4th Cir. 1944), *cert. denied,* 324 U.S. 860 (1945). Because Neidinger had not been confined prior to the sentence modification hearing, his original sentence of imprisonment had not yet commenced. *See* 18 U.S.C. § 3568.[1] His probation, moreover, had not

[1] 18 U.S.C. § 3568 states in relevant part that "[t]he sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence."

then begun, as the written judgment clearly states that probation was "to commence upon Defendant's release from confinement." We place no significance on the alleged ambiguity in the district court's remarks from the bench concerning the commencement of probation, given that Neidinger read, signed, and received a copy of the written judgment in the presence of the court, and, that he has not shown any reliance on the alleged ambiguity. Because neither the original sentence of imprisonment nor the probationary period had commenced as of the time of the modification, Neidinger cannot invoke the Fifth Amendment guarantee against double jeopardy.

We therefore are constrained to review the sentence with regard only to its legality, that is, whether the sentence falls within the statutory limits, and to the question of whether the district court in fact exercised discretion in sentencing. *See e.g., United States v. Bowser,* 497 F.2d 1017 (4th Cir. 1974), *cert. denied,* 419 U.S. 857 (1974); *United States v. Wilson,* 450 F.2d 495 (4th Cir. 1971). We review only the modified sentence, as the district court had the authority to increase, decrease or modify Neidinger's sentence at the July 16th hearing, its service having not then commenced. *See Acme Poultry Corp. v. United States,* 146 F.2d at 739 ("The general rule . . . is that the trial court has power to change a sentence at any time during the term at which it is imposed. The only limitation upon this power is that the sentence may not be increased . . . if the defendant has entered upon the service of a term of imprisonment.").[2]

[2] The original sentence in this case termed Neidinger's confinement in the Montgomery County Detention Center a "condition" of the sentence. As 18 U.S.C. § 4082(a) requires that a person who is convicted and sentenced be "committed . . . to the custody of the Attorney General of the United States, who shall designate the place of confinement," the "condition" placed by the district court on the sentence of imprisonment, was legally, mere surplusage. *See In re Grand Jury Proceedings,* 534 F.2d 41, 43 (5th Cir. 1976); *United States v. Herb,* 436 F.2d 566, 568 (6th Cir. 1971). A district court, however, is allowed to recommend a particular institution to the Attorney General in connection with a sentence, and as a practical matter, the

We find that the modified sentence is clearly legal: the one year suspended sentence does not exceed the one year statutory limit set forth in 26 U.S.C. § 7203, and the two year probationary term with provision for a sixty day residence at the Pre-Release Center meets the statutory terms of 18 U.S.C. § 3651.[3] The sentence being legal, we are left only with the inquiry of whether the district court indeed exercised discretion in sentencing Neidinger. The record indicates that the district court did not mechanistically sentence Neidinger but instead acted with discretion and took both societal considerations and Neidinger's personal circumstances into account in fashioning the punishment.

Because the modified sentence is legal, is the product of the district court's discretion, and does not place Neidinger in double jeopardy, we affirm it.

AFFIRMED.

Attorney General usually follows the recommendation. *See* 2 C. Wright, *Federal Practice and Procedure*, § 535 (1969). For purposes of this opinion, we treat the condition in the original sentence pertaining to the place of enforcement as a recommendation by the district court. It was the district court's discovery that the "recommendation" would not work that prompted the modification of the sentence.

[3] 18 U.S.C. § 3651 provides in relevant part as follows:

> . . . if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States . . . may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

United States Court of Appeals
For the Fourth Circuit

No. 80-5132

United States of America,
Appellee

v.

Andrew C. Neidinger,
Appellant

Order

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that petitioner for rehearing is DENIED

Entered at the direction of Judge Ervin for a panel consisting of Judge Butzner, Judge Phillips, and Judge Ervin.

United States Court of Appeals
For the Fourth Circuit

No. 80-5132

Andrew C. Neidinger,
Appellant

v.

United States of America,
Appellee

Appeal from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, Jr., District Judge.

Argued January 9, 1981 *Decided March 17, 1981*

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Corrected Opinion:

page 8a, lines 8-12

ERVIN, Circuit Judge:

Andrew Neidinger appeals the modified sentence imposed upon him by the district court for willful failure to fine a federal income tax return for 1974, in violation of 26 U.S.C. § 7203. Neidinger was originally sentenced on July 3, 1980 to one year of imprisonment, on the condition that he be confined in the Montgomery County Detention Center for thirty days and placed on work release. The district court suspended execution of the remainder of the sentence and order that Neidinger be put on probation for two years, the probationary period to commence following his release from confinement. Neidinger was ordered to report to the Detention Center upon written notice from the United States Marshal, and, in the absence of such notice, he was to surrender himself to the Marshal on July 24, 1980. Subsequent to the July 3rd hearing, and before Neidinger was placed in confinement, the district court learned that the Montgomery County Detention Center would not accept Neidinger for a thirty day work release program. The court therefore requested Neidinger to appear on July 16th for sentence modification. At that time, the court suspended execution of the entire one year sentence and placed Neidinger on immediate probation for two years, requiring him as a condition of probation to reside in the Montgomery County Pre-Release Center (a halfway house) for sixty days on work release.

Neidinger argues that the modified sentence increased his original sentence after he had commenced to serve it, and that it therefore violated the Fifth Amendment guarantee against double jeopardy.

We are not persuaded by this argument. Constitutional protection against double jeopardy does not attach prior to the commencement of a sentence. *See, e.g., United States v. Bynoe*, 562 F.2d 126 (1st Cir. 1977); *Acme Poultry Corp. v. United States*, 146 F.2d 738 (4th Cir. 1944), *cert. denied*, 324 U.S. 860 (1945). Because Neidinger had not been

confined prior to the sentence modification hearing, his original sentence of imprisonment had not yet commenced. *See* 18 U.S.C. § 3568.[1] His probation, moreover, had not then begun, as the written judgment clearly states that probation was "to commence upon Defendant's release from confinement." We place no significance on the alleged ambiguity in the district court's remarks from the bench concerning the commencement of probation, given that the written judgment is quite clear on that point and should be referred to for resolution of any ambiguities in the oral pronouncement. *See, e.g., Green v. United States*, 447 F.2d 987 (9th Cir. 1971), *cert. denied*, 405 U.S. 976 (1972). Because neither the original sentence of imprisonment nor the probationary period had commenced as of the time of the modification, Neidinger cannot invoke the Fifth Amendment guarantee against double jeopardy.

We therefore are constrained to review the sentence with regard only to its legality, that is, whether the sentence falls within the statutory limits, and to the question of whether the district court in fact exercised discretion in sentencing. *See e.g., United States v. Bowser*, 497 F.2d 1017 (4th Cir. 1974), *cert. denied*, 419 U.S. 857 (1974); *United States v. Wilson*, 450 F.2d 495 (4th Cir. 1971). We review only the modified sentence, as the district court had the authority to increase, decrease or modify Neidinger's sentence at the July 16th hearing, its service having not then commenced. *See Acme Poultry Corp. v. United States*, 146 F.2d at 739 ("The general rule . . . is that the trial court has power to change a sentence at any time during the term at which it is imposed. The only limitation upon this power is that the sentence may not be increased . . . if the defendant has entered upon the service of a term of imprisonment.").[2]

[1] 18 U.S.C. § 3568 states in relevant part that "[t]he sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence."

[2] The original sentence in this case termed Neidinger's confinement in the Montgomery County Detention Center a

We find that the modified sentence is clearly legal: the one year suspended sentence does not exceed the one year statutory limit set forth in 26 U.S.C. § 7203, and the two year probationary term with provision for a sixty day residence at the Pre-Release Center meets the statutory terms of 18 U.S.C. § 3651.[3] The sentence being legal, we are left only with the inquiry of whether the district court indeed exercised discretion in sentencing Neidinger. The record indicates that the district court did not mechanistically sentence Neidinger but instead acted with discretion and took both societal considerations and Neidinger's personal circumstances into account in fashioning the punishment.

Because the modified sentence is legal, is the product of the district court's discretion, and does not place Neidinger in double jeopardy, we affirm it.

AFFIRMED.

"condition" of the sentence. As 18 U.S.C. § 4082(a) requires that a person who is convicted and sentenced be "committed . . . to the custody of the Attorney General of the United States, who shall designate the place of confinement," the "condition" placed by the district court on the sentence of imprisonment, was legally, mere surplusage. *See In re Grand Jury Proceedings*, 534 F.2d 41, 43 (5th Cir. 1976); *United States v. Herb*, 436 F.2d 566, 568 (6th Cir. 1971). A district court, however, is allowed to recommend a particular institution to the Attorney General in connection with a sentence, and as a practical matter, the Attorney General usually follows the recommendation. *See* 2 C. Wright, *Federal Practice and Procedure*, § 535 (1969). For purposes of this opinion, we treat the condition in the original sentence pertaining to the place of enforcement as a recommendation by the district court. It was the district court's discovery that the "recommendation" would not work that prompted the modification of the sentence.

[3] 18 U.S.C. § 3651 provides in relevant part as follows:

> . . . if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States . . . may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Office-Supreme Court, U.S.
FILED
SEP 1 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-22

In the Supreme Court of the United States

OCTOBER TERM, 1980

ANDREW C. NEIDINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented in this criminal tax case is whether the district court properly modified a portion of petitioner's sentence from incarceration for 30 days in a detention center to 60 days in a half-way house.

The pertinent facts may be summarized as follows: On May 8, 1980, in the United States District Court for the District of Maryland, petitioner pled guilty to one count of willfully failing to file an income tax return for the year 1974 in violation of 26 U.S.C. 7203.[1] On July 3, 1980, petitioner was sentenced in

[1] Petitioner originally was charged with two counts of willful failure to file, but the second count was dismissed pursuant to the plea agreement.

accordance with the court's split-sentencing authority, 18 U.S.C. 3651,[2] for "one year, on the condition that the Defendant be confined in a jail-type institution on work release in a Montgomery County Detention Center for a period of 30 days. Execution of [the] balance of the sentence of imprisonment is suspended. The Defendant is placed on probation for a period of two years * * *" (J.A. 17-18).[3] As conditions of probation, petitioner was required to pay a fine, perform eleemosynary service, repay his past due taxes and not violate any laws (J.A. 18).[4]

At the time of sentencing the district court also noted that "as far as the period of time on work

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[2] The relevant portion of Section 3651 reads as follows:

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

[3] "J.A." refers to the joint appendix filed in the court of appeals.

[4] In the written Judgment and Probation/Commitment Order that was prepared after the sentencing, the probationary period was described as follows: "Defendant is placed on Probation for the period of Two (2) Years, to commence upon Defendant's release from confinement * * *" (J.A. 28).

release is concerned that will depend upon the availability of a space in the Montgomery County Detention Center, among other things" (J.A. 18). After the July 3 hearing and before petitioner submitted himself to the custody of the detention center, the district court was informed that the Montgomery County Detention Center would not accept any inmate for a period of less than 60 days (Pet. 5).

The district court held a second sentencing hearing on July 16, 1980. The court informed petitioner of the problem and explained that it believed it was appropriate to sentence petitioner either to 30 days in a regular jail or 60 days in the Montgomery County Pre-Release Center, which is a half-way house (J.A. 24). The court sentenced petitioner as follows (J.A. 24-25):

> [O]ne year as to Count 1. Execution of the sentence of imprisonment is hereby suspended, and the Defendant is placed on probation for a period of two years from this date on the usual conditions of probation and * * * [t]hat he reside in the Montgomery County Pre-Release Center on work release for a period of 60 days * * *.

2. Petitioner appealed the modification of his sentence, and the court of appeals affirmed (Pet. App. 1a-4a). First, it held (Pet. App. 2a-3a) that the sentence did not violate the Double Jeopardy Clause of the Fifth Amendment because its protections do not attach until service of the sentence begins, citing *United States* v. *Bynoe*, 562 F.2d 126 (1st Cir. 1977); *Acme Poultry Corp.* v. *United States*, 146 F.2d 738 (4th Cir. 1944), cert. denied, 324 U.S. 860 (1945), and petitioner's sentence had not begun prior to the second sentencing hearing. Second, it found

(Pet. App. 3a-4a) that the sentence as modified was a permissible sentence for a violation 26 U.S.C. 7203 and that the district court had exercised appropriate discretion in sentencing petitioner. The court denied a petition for rehearing (Pet. App. 5a).[5]

3. Petitioner asserts (Pet. 6) that the district court in its oral sentence stated that "probation starts immediately," and therefore his sentence already had begun when the court "increased" it on July 16. Petitioner contends that the court of appeals avoided holding the resentencing to be double jeopardy by relying upon the written order. Petitioner concludes (Pet. 7-10) that this use of the written order to modify the oral sentence conflicts with numerous court of appeals decisions and therefore warrants review by this Court.[6]

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[5] Petitioner took issue with a statement in the original opinion (Pet. App. 1a-4a) that he had been shown a copy of the written order at the time of sentencing. The court reissued the opinion (Pet. App. 7a-9a) excising the contested sentence and replacing it with the statement that the written order should be referred to in order to resolve any ambiguities in the oral pronouncement of sentence (Pet. App. 8a). As appears more fully below, there was no ambiguity in the oral sentence in this case and therefore reliance on the written judgment was unnecessary.

[6] Petitioner's argument is constructed on the premise that the Double Jeopardy Clause bars any increase in a sentence once service (even a period of probation) has commenced. This premise is questionable in light of *United States* v. *DiFrancesco*, No. 79-567 (Dec. 9, 1980). See also *United States* v. *Busic*, 624 F.2d 1091 (3d Cir.), cert. denied, No. 80-5363 (Nov. 3, 1980). Since, as explained in the text, petitioner had not in fact commenced serving his sentence at the time it was altered, there is no need for this Court to consider what his rights would have been if he had.

Petitioner's argument is based wholly on a misinterpretation of the record. The statement that petitioner relies upon (Pet. 6), regarding when probation was to begin, was made at the end of the second sentencing hearing (J.A. 27). At the first sentencing hearing, the district court did not specify when the probation period was to begin. It simply placed him on probation for two years as part of the split sentence under 18 U.S.C. 3651. There is no factual basis for petitioner's claim and, thus, cases relied upon by petitioner dealing with discrepancies between the oral and written pronouncement of sentence are inapposite.

Nor was there ambiguity in the imposition of the first sentence. Because the probation under Section 3651 is imposed only after the suspension of the sentence, it is naturally assumed that, absent something to the contrary, the probationary period commences at the end of the incarceration. See *United States* v. *Clayton*, 588 F.2d 1288, 1291 (9th Cir. 1979); *Gaddis* v. *United States*, 280 F.2d 334, 336 (6th Cir. 1960). The written order specifying probation after incarceration reconfirmed the statement of the district court, which in context was unambiguous.

4. Petitioner's second argument (Pet. 10-12) is that the decision of the court of appeals that probation did not commence at the time of sentencing conflicts with decisions of other courts of appeals. Those cases are, however, distinguishable. In *Sanford* v. *King*, 136 F.2d 106, 108 (5th Cir. 1943), the court held that "the intention of the Court imposing sentence" is the "controlling consideration" and that the most reasonable interpretation of the sentencing judge's oral pronouncement in that case was that probation should begin immediately. In the instant case

all indications were that the probation should commence at the end of the 30-day work-release detention.

In *United States* v. *Rosenstreich*, 204 F.2d 321 (2d Cir. 1953), the sentence was a fine followed by probation. The defendant paid the fine immediately and the issue was whether probation began then or when the defendant submitted to the technical custody of the probation authorities. That issue is not posed in this case because petitioner never fulfilled the preconditions to his probation.[7]

The court of appeals properly concluded that petitioner's probation did not begin prior to the second sentencing hearing and therefore the modification of the sentence was permissible. The decision does not conflict with any decision of any other court and therefore does not warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1981

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[7] Petitioner also cites *Gaddis* v. *United States*, 280 F.2d 334, 336 (6th Cir. 1960). The court did make the statement quoted by petitioner (Pet. 11) to the effect that probation began immediately, but it did so in the context of deciding whether a written order that a sentence was consecutive was controlling over an oral pronouncement which did not specify concurrent or consecutive terms. Thus this dictum, which relied upon *United States* v. *Rosenstreich*, *supra*, and *Sanford* v. *King*, *supra*, added nothing to those prior decisions.

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